# Lin Wen-Chih & Anor v Pacific Forest Industries Sdn Bhd & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-38–07 OF 2021(S)
ABANG ISKANDAR PCA, ZAWAWI SALLEH AND ZABARIAH YUSOF FCJJ
7 AUGUST 2023

*Civil Procedure — Res judicata — Subsequent suit with same subject-matter and same parties — Whether plaintiffs could not re-litigate cause of action, subject-matter and issues between the same parties which had been conclusively determined on the merits by the courts previously — Whether 'new issues' plaintiffs raised in subsequent suit were also caught by res judicata in the wider sense as those issues should have been raised in the earlier proceedings*

Although ten questions of law on a host of issues were raised by the appellants in the instant appeal, none of them were answered by the Federal Court which decided the appeal solely on the ground of res judicata. The first respondent ('R1') owed the appellants RM10,134,000 ('the debt'), the re-payment of which was guaranteed by the second respondent. In a November 1996 letter to the appellants ('the letter of acknowledgement'), R1 proposed to settle the debt over a ten-month period by way of sale of its timber products to the appellants in four shipments. The sale price for each shipment was to progressively decrease the debt until it was extinguished by the fourth shipment. The letter also stated that if R1 failed to supply any shipment ordered by the appellants or if the products supplied were rejected for any valid reason, R1 would pay the appellants cash in lieu of the timber products in settlement of the debt. Pursuant to the letter, one delivery of the timber products was successfully completed, thereby reducing the debt to either RM6,223,241.10 (as claimed by the appellants) or RM5,431,454.87 (as claimed by R1). In 1997, the appellants sued the respondents to recover the RM6,223,241.10. The High Court dismissed the suit on the ground that the claim was premature because the condition for R1 to settle the debt in cash under the letter of acknowledgement had not been triggered as only one of the four purchase orders had been completed. The Court of Appeal ('COA') set aside the High Court's decision on the ground that the repayment arrangement between the parties had been frustrated. The Federal Court, in 2009, set aside the COA's verdict and reinstated the High Court's decision on finding that the appellants had never pleaded 'frustration'. In 2012, the appellants placed a fresh order for timber products from R1 (despite knowing that R1's sawmill had stopped operating in 1998) and when the supply never came, the appellants cancelled the purchase order, demanded immediate cash payment of RM6,223,241 from

A the respondents and filed a fresh suit against them for the sum in 2013. The respondents denied liability on the grounds of limitation and res judicata. Despite finding that neither limitation nor res judicata applied, the High Court dismissed the suit on the ground that since the appellants never made any genuine purchase order for supply of timber products from R1, the latter B did not commit any default under the letter of acknowledgement and, consequently, it was not obliged to settle the balance of the debt in cash. The COA upheld the dismissal of the suit but not for the reasons given by the High Court, but on the ground that the appellants' claim in the 2013 suit was not only time-barred but barred by res judicata as the cause of action, C subject-matter, the evidence adduced and the issues raised by the appellants in both the 1997 and 2013 suits were exactly, if not substantially, the same.

**Held**, unanimously dismissing the appeal and affirming the COA's decision:

D (1) The Court of Appeal correctly applied the principle of res judicata to the circumstances of this case to hold that the issues raised in the 2013 suit were identical or similar to those raised in the 1997 suit and that 'new issues' raised in the 2013 suit were also caught by res judicata in its wider sense as those issues could and should have been raised in the 1997 suit E (see para 5).

(2) This court was satisfied that the important elements of res judicata were established and proved — the parties were exactly the same and the subject-matter in the 2013 suit, which was based on the same admission of debt evidenced through the letter of acknowledgement and the letter F of undertaking, had been conclusively dealt with on the merits by the courts in the 1997 suit (see para 44).

(3) The 'new issues' that the appellants claimed they had raised in the 2013 suit but not in the 1997 suit were caught by res judicata in the wider sense G as the doctrine applied not only to points upon which the court was required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject-matter of the litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time (see para 45).

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**[Bahasa Malaysia summary**

Walaupun sepuluh persoalan undang-undang mengenai pelbagai isu telah dibangkitkan oleh perayu dalam rayuan semasa, tiada satu pun daripadanya dijawab oleh Mahkamah Persekutuan yang memutuskan rayuan tersebut I semata-mata atas alasan res judicata. Responden pertama ('R1') berhutang kepada perayu RM10,134,000 ('hutang tersebut'), yang pembayaran semulanya dijamin oleh responden kedua. Dalam surat November 1996 kepada perayu ('surat akuan terima'), R1 mencadangkan untuk menyelesaikan hutang dalam tempoh sepuluh bulan melalui penjualan hasil kayunya kepada

perayu dalam empat penghantaran. Harga jualan bagi setiap penghantaran adalah untuk mengurangkan hutang secara beransur-ansur sehingga ia diselesaikan oleh penghantaran keempat. Surat tersebut juga menyatakan bahawa jika R1 gagal membekalkan apa-apa penghantaran yang dipesan oleh perayu atau jika produk yang dibekalkan ditolak atas apa-apa sebab yang sah, R1 akan membayar perayu secara tunai sebagai ganti hasil kayu sebagai penyelesaian hutang. Menurut surat tersebut, satu penghantaran hasil kayu telah berjaya diselesaikan, sekali gus mengurangkan hutang kepada sama ada RM6,223,241.10 (seperti yang didakwa oleh perayu) atau RM5,431,454.87 (seperti yang didakwa oleh R1). Pada tahun 1997, perayu menyaman responden untuk mendapatkan semula RM6,223,241.10. Mahkamah Tinggi menolak saman tersebut atas alasan bahawa tuntutan tersebut adalah pramatang kerana syarat untuk R1 menyelesaikan hutang secara tunai di bawah surat akuan terima tidak dimulakan kerana hanya satu daripada empat pesanan pembelian telah diselesaikan. Mahkamah Rayuan ('MR') mengetepikan keputusan Mahkamah Tinggi atas alasan bahawa persetujuan pembayaran balik antara pihak-pihak telah dikecewakan. Mahkamah Persekutuan, pada 2009, mengetepikan keputusan MR dan mengembalikan semula keputusan Mahkamah Tinggi apabila mendapati perayu tidak pernah memplidkan 'kekecewaan'. Pada tahun 2012, perayu-perayu telah membuat tempahan baharu untuk produk kayu daripada R1 (walaupun mengetahui kilang papan R1 telah berhenti beroperasi pada tahun 1998) dan apabila bekalan tidak pernah datang, perayu-perayu membatalkan pesanan pembelian, menuntut bayaran tunai segera sebanyak RM6,223,241 daripada responden dan memfailkan saman baharu terhadap mereka untuk jumlah tersebut pada 2013. Responden menafikan liabiliti atas alasan had masa dan res judicata. Walaupun membuat dapatan bahawa tiada had masa atau res judicata terpakai, Mahkamah Tinggi menolak saman tersebut atas alasan bahawa oleh kerana perayu tidak pernah membuat sebarang pesanan pembelian tulen untuk pembekalan produk kayu daripada R1, ia tidak melakukan sebarang keingkaran di bawah surat akuan terima dan, akibatnya, ia tidak diwajibkan untuk menjelaskan baki hutang secara tunai. MR mengekalkan penolakan saman tersebut tetapi bukan atas alasan yang diberikan oleh Mahkamah Tinggi, tetapi atas alasan bahawa tuntutan perayu dalam Saman 2013 bukan sahaja dihalang oleh had masa tetapi dihalang oleh res judicata kerana kausa tindakan, perkara utama, keterangan yang dikemukakan dan isu-isu yang dibangkitkan oleh perayu-perayu dalam kedua-dua Saman 1997 dan 2013 adalah sama, jika tidak sebahagian besarnya.

**Diputuskan**, sebulat suara menolak rayuan dan mengekalkan keputusan MR:

(1) Mahkamah Rayuan mengguna pakai prinsip res judicata dengan betul pada keadaan kes ini dalam memutuskan bahawa isu yang dibangkitkan dalam Saman 2013 adalah sama atau serupa dengan yang dibangkitkan dalam Saman 1997 dan bahawa 'isu baharu' yang dibangkitkan dalam

Saman 2013 juga dinafikan oleh res judicata dalam erti kata yang lebih luas kerana isu tersebut boleh dan sepatutnya dibangkitkan dalam Saman 1997 (lihat perenggan 5).

(2) Mahkamah ini berpuas hati bahawa unsur-unsur penting res judicata telah diwujudkan dan dibuktikan — pihak-pihak adalah sama dan perkara utama dalam Saman 2013, yang berdasarkan pengakuan hutang yang sama yang dibuktikan melalui surat akuan terima dan surat aku janji, telah diputuskan secara muktamad berdasarkan merit oleh mahkamah dalam Saman 1997 (lihat perenggan 44).

(3) 'Isu-isu baharu' yang didakwa oleh perayu-perayu yang mereka bangkitkan dalam Saman 2013 tetapi tidak dalam Saman 1997 telah dinafikan oleh res judicata dalam erti kata yang lebih luas kerana doktrin tersebut digunakan bukan sahaja pada perkara yang mahkamah kehendaki oleh pihak-pihak untuk membuat pendapat dan memberikan penghakiman, tetapi kepada setiap perkara yang sepatutnya menjadi perkara utama litigasi, dan yang mana pihak-pihak tersebut, yang mengguna pakai usaha yang munasabah, mungkin telah dibawa ke hadapan pada masa itu (lihat perenggan 45).]

**Cases referred to**

*Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189, SC (refd)

*Carl-Zeiss-Stiftung v Rayner and Keeler Ltd and Others (No 2)* [1966] 2 All ER 536, HL (refd)

*Greenhalgh v Mallard* [1947] 2 All ER 255, CA (refd)

*Henderson v Henderson* (1843) 3 Hare 100 (refd)

*Hoystead and Others v Taxation Commissioner* [1926] AC 155, PC (refd)

*Lin Wen-Chih & Anor v Pacific Forest Industries Sdn Bhd & Anor* [2021] 4 MLJ 367, CA (refd)

*Lin Wen-Chih & Anor v Pacific Forest Industries Sdn Bhd & Anor* [2019] 9 MLJ 227, HC (refd)

*Lin Wen-Chih & Anor v Pacific Forest Industries Sdn Bhd (formerly known as Veramax Sdn Bhd) & Anor* [2000] MLJU 533; [2001] 1 AMR 988, HC (refd)

*Lin Wen-Chih & Anor v Pacific Forest Industries Sdn Bhd (formerly known as Veramax Sdn Bhd) & Anor* [2008] 6 MLJ 89, CA (refd)

*Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor* [2009] 6 MLJ 293, FC (refd)

*The Pacific Bank Bhd v Chan Peng Leong* [1998] 2 MLJ 613, CA (refd)

*Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581, PC (refd)

**Legislation referred to**

Limitation Ordinance (Cap 72) ss 9, 14, Schedule, items 97, 102

**Appeal from:** *Lin Wen-Chih & Anor v Pacific Forest Industries Sdn Bhd & Anor* [2021] 4 MLJ 367 (Court of Appeal, Putrajaya)

*Roland Cheng Ho Wah (Roland Cheng & Co) for the appellants.*
*Alex Decena (with Victor Chong Thien Loi and Leslie Chaw) (Poh & Victor Chong) for the respondents.*

**Abang Iskandar PCA:**

INTRODUCTION

**[1]** We heard this appeal on 14 February 2022 with ten questions of law ('QOL') granted at the leave stage for our determination. The ten QOLs concern mainly issues of unjust enrichment; res judicata; limitation; constructive/implied trust; estoppel; frustration; reciprocal promises; and appellate jurisdiction. The ten QOLs read:

(a) whether the test for unjust enrichment is act or delivery of thing that can be said to have done by the plaintiffs which was not intended to be done gratuitously that had benefitted the defendants?

(b) whether res judicata applies to a second action filed after the Federal Court in a first action has ruled it to be premature with unsatisfied conditions precedent?

(c) whether the time ceases to run under the Sabah Limitation Ordinance ('the SLO') during the duration of prosecution and appeal of a first action subsequently ruled by the Federal Court as premature and such time is excluded for filing a second action?

(d) whether an admission of debt found and not extinguished can be categorised under constructive or implied trust thereby excluded under s 9 of the SLO?

(e) whether estoppel per se applies to admitted debt by a party from reneging its obligation to pay the admitted debt?

(f) whether a claim for unjust enrichment and/or for frustration falls under items 97 or 102 of the SLO? If so, whether the limitation for unjust enrichment and/or frustration is six years or 12 years?

(g) whether a second panel of Court of Appeal may revisit and revise a finding by the first panel of Court of Appeal on a same point of law and or fact? If so, what are the conditions under which a second panel of Court of Appeal may do so?

A (h) when does the cause of action arise and limitation starts to run for an admitted debt found to be not extinguished?

(i) whether the findings and pleadings in earlier judgments in a first action in respect of the same case by the High Court and Federal Court are binding on a second panel? If so, what are the circumstances in which the court may go beyond the pleaded case and refer to an earlier judgment on the same case? and

(j) whether the test is 'objective aim' or 'real nature of transaction' to determine the order of performance of reciprocal promises?

**[2]** Before us, the major attack of the Court of Appeal decision was in respect of the alleged reopening of the issues that were already decided in the first 1997 suit in the sense that the Court of Appeal had redefined the meaning of 'premature' inconsistent with what was held and decided by the courts in the 1997 suit. This was raised in relation to the res judicata issue.

**[3]** Other matters concern the defence of limitation to the admitted debt that was allegedly not extinguished, unjust enrichment, constructive trust, frustration, estoppel and reciprocal promises.

OUR DECISION

**[4]** Having read the cause papers and parties' written submissions and having heard and considered the oral submissions by both the learned counsel on all issues raised, we were unanimous in our view that the one issue that will determine and dispose of the appeal was whether the appellants' case was caught by res judicata.

**[5]** In that regard, we were with the learned counsel for the respondents that the Court of Appeal justices were correct in applying the principle of res judicata to the circumstances of this appeal when holding that the issues raised in the 2013 suit were identical and bore similarities with those raised in the 1997 suit. Those issues raised in the 2013 suit were issues that could have been raised in the 1997 suit and as such, they were caught by the principle of res judicata in the wider sense.

**[6]** We therefore declined to answer the questions posed before us because the outcome of that exercise will not alter the decision of the Court of Appeal.

BACKGROUND FACTS AND ANTECEDENT PROCEEDINGS

**[7]** We begin by stating the background facts and the antecedent proceedings which are relevant and material in order to better appreciate the why and how res judicata applies in this appeal.

*Parties' relationship*

**[8]** This case concerns a claim for debt owed by a company to former directors/shareholders. Lim Wen-Chih and Lim Wen-Chian ('plaintiffs') are brothers of Taiwanese nationals who were former shareholders and directors of Pacific Forest Industries Sdn Bhd ('first defendant'). They ceased to be shareholders/directors of the first defendant when they sold their shares to one Liu Ho-Tien who was described as the representative and nominee of Dutaland Bhd, formerly known as Mycom Bhd ('second defendant').

**[9]** It was not disputed that at all material times the first defendant was indebted to the plaintiffs a total sum of RM10,134,000 as of 28 August 1996. The debt was admitted, acknowledged and evidenced, primarily through the first defendant's letter of acknowledgment dated 12 November 1996, and which was guaranteed by the second defendant's letter of undertaking similarly dated 12 November 1996.

**[10]** The first defendant's letter of acknowledgment is the most critical document as, although it was supposed to evidence parties' agreement on the mode of payment of the admitted debt, there were differences of interpretation by the parties of their rights and responsibilities in respect of the debt's settlement, particularly in respect of the following clauses, which we reproduced in verbatim:

> ...
>
> 2) We shall sell and you shall purchase timber products manufactured by us ('the Timber Products') at a price consistent with the prevailing market price and costing the same amount as the Outstanding Sum plus the Agreed Interest ('the Timber Products Price') from us over a period of ten (10) months from today and to be delivered over four (4) shipments;
>
> 3) the Timber Products Price shall be deducted from and set-off against the Outstanding Sum and the Agreed Interest;
>
> 4) subject to item 5 hereinafter contained, the Outstanding Sum and the Agreed Interest shall be repaid by us to you only by way of deduction from and set-off against the Timber Products Price;
>
> 5) in the event that we shall fail, refuse and/or neglect to supply any of the Timber Products ordered by you or if any of the Timber Products supplied by us shall not be

A in accordance with the specifications stated in your purchase order(s), you shall be entitled, after giving us thirty (30) days' notice in writing to supply the Timber Products or replace the defective Timber Products and we have failed to do so, to cancel the order for such Timber Products or reject such Timber Products. Upon the order for such Timber Products being cancelled or such Timber Products being rejected and returned to us, we shall then pay cash in lieu of such Timber Products to you and such cash payment shall be deducted from and set-off against the Outstanding Sum and the Agreed Interest; and

...

C **[11]** Pursuant to this arrangement, one delivery of timber products was successfully completed, hence reducing the debt amount to either RM6,223,241.10 as claimed by the plaintiffs, or RM5,431,454.87 as alleged by the first defendant.

D *The first 1997 suit*

**[12]** In 1997, the plaintiffs filed the suit to claim RM6,223,241.10 being the balance of the outstanding sum. This claim was dismissed by the High Court on the basis of 'premature' as the 'plaintiffs failed to comply with the terms E stipulated in exh P2 ('the letter of acknowledgment') within the time specified or within a reasonable time after the expiry and since it was not shown that the events that could have triggered the payment of cash had arisen' as there was only one concluded order for the timber products out of four orders as contemplated in the letter of acknowledgment. The said decision is reported in F *Lin Wen-Chih & Anor v Pacific Forest Industries Sdn Bhd (formerly known as Veramax Sdn Bhd) & Anor* [2000] MLJU 533; [2001] 1 AMR 988.

**[13]** On appeal, the Court of Appeal reversed the findings of the High Court G and set aside its decision on the basis of 'frustration' as reported in *Lin Wen-Chih & Anor v Pacific Forest Industries Sdn Bhd (formerly known as Veramax Sdn Bhd) & Anor* [2008] 6 MLJ 89.

**[14]** On further appeal to the Federal Court, both the defendants succeeded H in setting aside the decision of the Court of Appeal and reinstating the judgment of the High Court because the 'frustration' issue which was the basis of the Court of Appeal's decision was not the plaintiff's pleaded ground. The decision of the Federal Court is reported in *Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor* [2009] 6 MLJ 293.

I **[15]** Notwithstanding, the matter did not end there. Another action was taken about three years after the 2009 decision of the Federal Court.

*The second 2013 suit*

**[16]** Despite knowing that the first defendant had stopped operating the sawmill in July 1998, the plaintiffs issued another fresh order dated 23 October 2012 for the supply of timber products purportedly as per the letter of acknowledgment. 30 days were given for shipment of the timber products. Nothing was forthcoming from the first defendant. Thereafter, the plaintiffs issued another letter in December 2012 cancelling the purchase order and demanding immediate cash payment of RM6,223,241. A letter of demand was also sent to the second defendant as a guarantor. In May 2013, the plaintiffs filed the writ claiming the said sum together with interest thereto.

**[17]** The defendants admitted receiving the notices and demands by the plaintiffs. However, they denied liability mainly on two grounds — limitation and res judicata. Hence, a striking out application was filed and was allowed by the High Court.

**[18]** However, on appeal, the Court of Appeal reinstated the 2013 suit and set aside the High Court striking out order. Leave to appeal to the Federal Court was dismissed, and a review of the said Federal Court's decision was withdrawn. The 2013 suit then proceeded to trial. It is reported in *Lin Wen-Chih & Anor v Pacific Forest Industries Sdn Bhd & Anor* [2019] 9 MLJ 227.

**[19]** In this 2013 suit, the High Court was of the view that the claim was not barred by limitation or res judicata. Limitation did not set in because the 'parties were actively involved during the process of litigation in the 1997 suit when the said suit was filed on 22 November 1997 until it was finally decided on 7 September 2009 by the Federal Court after the appeal arising from the High Court and the Court of Appeal'.

**[20]** As regards res judicata, the High Court provided three main reasons. Firstly, it noted that the 2013 suit concerned the claim for 'the fresh order of Timber Products they made on 23 October 2012 after the expiry of the ten months' period as per the term of the letter of acknowledgment and subsequent to the pronouncement of the judgment in the 1997 suit'. The High Court was of the view that 'This fresh order in 2012 is made possible since the previous High Court held that the plaintiffs' claim is premature due to incomplete orders which finding is confirmed and upheld by the Federal Court'.

**[21]** Secondly, it was of the view that the defendants' striking out application which was initially allowed by the High Court, was dismissed by the Court of Appeal. Further, by virtue of the dismissal for leave to appeal to the Federal Court, the High Court took the stance that 'This only goes to show that the

A Federal Court is of the view that the principle of res judicata had no application in this case', such that based on the principle of stare decisis, the plaintiffs' claim was not caught by res judicata.

B **[22]** Thirdly, the High Court referred to the decision of the Court of Appeal in *The Pacific Bank Bhd v Chan Peng Leong* [1998] 2 MLJ 613 ('the Pacific Bank Bhd') to support its view that the dismissal of the plaintiffs' claim in 1997 on the ground of premature was not a bar to the recovery of the said debt in the 2013 suit.

C **[23]** Having so decided however, the High Court dismissed the plaintiffs' claim after a full trial. We do not intend to delve into every aspect of the High Court's findings, but will focus on those aspects relating to its dismissal, on evidence, of the plaintiffs' claim.

D **[24]** Briefly, the High Court viewed that although the defendants admitted the debt, the parties were however bound by the agreed mechanism for the payment according to the letter of acknowledgment, that is 'by way of contra and set off against the purchase price of the sale and supply of timber products E over the period of ten months'. Importantly, the High Court found that there was only one concluded sale and which was set-off against the debt.

**[25]** The High Court also found that the alleged three other orders were mere enquiries and not formal offers to purchase the timber products due to F the absence of agreement on the pricing. As the plaintiffs failed to prove these three further orders and that the first defendants had refused to sell the timber products and/or had quoted higher price, the first defendant cannot be said to have failed to fulfil its obligation under the letter of acknowledgment.

G **[26]** In other words, the High Court was of the view that based on the letter of acknowledgment, the plaintiffs were duty bound to first make the orders before the first defendant can supply the ordered timber products. Hence, the High Court found that the plaintiffs, 'by their own conduct had failed to H comply with the express and clear terms of the letter of acknowledgment'.

**[27]** The cash payment cl 5 was also not triggered as no evidence was adduced to show that 'the first defendant had refused to sell the timber products or if the timber products are sold, they were not in accordance with I the specification or defective which give the plaintiffs the right to cancel the order and to claim for cash payment upon the expiry of the specified period'.

**[28]** Another important finding was that the 2012 fresh order was held to be a sham order to trigger utilisation of cash payment in cl 5 of the letter of acknowledgment, despite knowing that the first defendant had already closed down in 1998.

## THE PLAINTIFFS' APPEAL AND DEFENDANTS' CROSS-APPEAL ON LIMITATION AND RES JUDICATA

**[29]** Dissatisfied, the plaintiffs appealed to the Court of Appeal. The defendants also filed notice of cross-appeal against the High Court's decision in respect of the issues of limitation and res judicata. This is reported in *Lin Wen-Chih & Anor v Pacific Forest Industries Sdn Bhd & Anor* [2021] 4 MLJ 367. Briefly, the Court of Appeal affirmed the High Court's dismissal of the plaintiffs' claim but reversed the findings on limitation and res judicata.

**[30]** On limitation, the Court of Appeal held that the 2013 suit was statutorily barred as it was filed about ten years after the action was time-barred by 9 November 2003. On suspension of the limitation period by virtue of the earlier 1997 suit which was finally disposed of by the Federal Court in 2009, the Court of Appeal found that the exclusionary provision in s 14 of the Limitation Ordinance 1952 was not applicable to the facts of the case as there was no issue of jurisdiction or defect of it in the 1997 suit.

**[31]** Commenting on the case of *The Pacific Bank Bhd* relied on by the High Court as the authority that permits the filing of a fresh action, the Court of Appeal reasoned the 'premature' ground in the first 1997 suit was not in the same sense as described or envisaged in *The Pacific Bank Bhd* because the Court of Appeal therein held the first letter of demand to be defective, which effectively means no proper demand was made and as such, there was in law, no valid cause of action entitling the issuance of the fresh demand.

**[32]** As for res judicata, the Court of Appeal had, upon analysing relevant reported cases and after a careful examination of the judgment of the 1997 suit, found that the facts and circumstances of the present case come within the principle of res judicata in the wider sense because:

(a) cause of action in both 1997 and 2013 suits were exactly the same which was based on the letter of acknowledgment and the letter of undertaking;

(b) the subject matter of both suits was exactly the same — the alleged outstanding sum of RM6,223,241 except for the accruing interest claimed in the 2013 suit; and

(c) the evidence adduced and issues raised by the plaintiffs in the 2013 suit were substantially similar to what was produced in the 1997 suit.

**[33]** On the alleged 'new issues' in the 2013 suit regarding the plaintiffs being relieved of the obligations upon the expiry of the set-off period; the 'void or voidable' status of the arrangement of payment in the letter of acknowledgment; and unjust enrichment, the Court of Appeal viewed that 'these are issues which could have been, but were not raised in the 1997 suit ...'. Hence, it was held that 'res judicata applies in respect of the multitude of issues which had been raised in the 2013 suit which are identical or bear a striking similarity to the issues which were raised in the 1997 suit. And, in so far as the so-called new issues are concerned, those are barred by res judicata in the wider sense'.

HOW DOES RES JUDICATA APPLY?

*Res judicata in the wider sense*

**[34]** In deciding that the facts and circumstances of this case fall within the res judicata in the wider sense, we referred to what the Supreme Court held in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189. Peh Swee Chin FCJ (delivering the judgment of the court), in accepting the well-established meaning, utility and necessity of res judicata, acknowledged the difference of opinion and school of thought as to its precise limits and application in particular cases.

**[35]** The Supreme Court preferred the view that issues which might have been and which were not brought forward, either deliberately or due to negligence or inadvertence, though not actually decided by the court, are still covered by the doctrine of res judicata. The justification for holding to such view is, as aptly stated that:

> ... it represents for one thing, a correct even though broader approach to the scope of issue estoppel. It is warranted by the weight of authorities to be illustrated later. It is completely in accord or resonant with the rationales behind the doctrine of res judicata, in other words, with the doctrine of estoppel *per rem judicatum*. It is particularly important to bear in mind the question of the public policy that there should be finality in litigation in conjunction with the exploding population; the increasing sophistication of the populace with the law and with the expanding resources of the courts being found always one step behind the resulting increase in litigation.

**[36]** *Henderson v Henderson* (1843) 3 Hare 100 was quoted as defining the application of res judicata 'not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time'.

**[37]** The 'every point which properly belonged to the subject of litigation' in *Henderson* which was subsequently explained by Somervell LJ in *Greenhalgh v Mallard* [1947] 2 All ER 255 as covering 'issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them' was quoted with approval by the Privy Council in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581.

**[38]** In this case, the plaintiffs highlighted that res judicata did not apply mainly because:

(a) the 1997 suit was held to be premature, entitling the plaintiffs to a fresh claim; and

(b) the 2013 suit included new issues of unjust enrichment; reciprocal enforcement of the terms contained in the letter of acknowledgment; self-induced frustration; and void or voidability of the payment arrangement — which are all not included in the 1997 suit.

**[39]** As regards 'premature' 1997 suit, the plaintiffs challenged the Court of Appeal's assessment of the meaning of 'premature' in relation to the issue of res judicata. It was alleged that the Court of Appeal has ascribed other meaning to such word when stating the following:

> [147] The next point we will make as to the 1997 suit being 'premature' is that the word premature which was used by the trial judge to describe that suit was perhaps somewhat of a misnomer. Our understanding is that the 1997 suit was not premature in the sense as described or envisaged in *The Pacific Bank Case*.

**[40]** We have carefully read and examined the written judgment of the Court of Appeal, specifically those paragraphs where 'premature' issue was discussed, and we found that there was no redefinition of the word 'premature' as alleged. In fact, its understanding of the meaning of 'premature' was consistent with what the courts in the 1997 had described.

**[41]** Firstly, it is important to understand that the authority used by the plaintiffs which was also cited by the High Court in the 2013 suit as supporting the fresh claim was *The Pacific Bank Bhd* case where Gopal Sri Ram JCA permitted the filing of a fresh action which was based on a defective invalid demand. In that regard, the Court of Appeal undertook a comparative analysis of the facts in *The Pacific Bank Bhd* and the present case, and concluded that 'premature' as meant by the High Court and the Federal Court in the 1997 suit exemplified the fact that 'the plaintiffs had not complied with the terms of the letter of acknowledgment (Clause 5) so as to trigger the first defendant's obligation to pay in cash … that the plaintiffs had not made out their case for purposes of the claim which was predicated on the letter of acknowledgment'.

**[42]** The above statement by the Court of Appeal was in line with what the High Court stated in the 1997 suit that 'since the plaintiffs failed to comply with the terms stipulated in exh P2 within the time specified or within a reasonable time after the expiry and since it was not shown that the events that could have triggered the payment of cash had arisen the claim should therefore be taken as premature'. On this basis, we found no error by the Court of Appeal in its understanding of the meaning of 'premature' of 1997 suit.

**[43]** We must also add that in a challenge based on res judicata, the court is entitled to examine and analyse the written judgments of the first 1997 suits and all other relevant records of appeal. As aptly stated by Lord Upjohn in the House of Lords' case of *Carl-Zeiss-Stiftung v Rayner and Keeler Ltd and Others (No 2)* [1966] 2 All ER 536 that:

> The broader principle of res judicata is founded on the twin principles so frequently expressed in Latin that they should be at an end to litigation and justice demands that the same party shall not be harassed twice for the same cause. It goes beyond the mere record; it is part of the law of evidence for, to see whether it applies, the facts and reasons given by the judge, his judgement, the pleadings, the evidence and even the history of the matter may be taken into account ...

**[44]** In this respect, we were satisfied that the important elements of res judicata were established and proved — that the identity of the subject matter of the present claim which was based on the same admission of debt evidenced through the letter of acknowledgment and the letter of undertaking had been conclusively dealt with on merits by the courts in the 1997 suit; and that the parties are exactly similar.

**[45]** On the new issues raised, we have highlighted that we agreed with the findings and decision of the Court of Appeal that those new issues, albeit being newly raised, are issues which fall under the category where '... The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time' (per Sir James Wigram VC in *Henderson v Henderson* above).

**[46]** To conclude, we think it is appropriate to cite a passage by Lord Shaw (delivering the judgment of the Judicial Committee) in *Hoystead and Others v Taxation Commissioner* [1926] AC 155 in respect of the application of res judicata, in the following statement:

> In the opinion of Their Lordships it is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgment upon a different assumption of

fact; secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact. Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle. Thirdly, the same principle — namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken. The same principle of setting parties' rights to rest applies and estoppel occurs.

**[47]** Thus, given the strength of the authorities relied on in *Asia Commercial Finance*, we were constrained to hold that upon close examination and analysis of the facts and circumstances of this case, res judicata in the wider sense was rightly applied by the Court of Appeal.

**[48]** In the upshot, we dismissed the appeal with cost of fifty thousand ringgit to the respondents to be paid by the appellants subject to allocator fees. The decision of the Court of Appeal was therefore affirmed.

*Appeal dismissed and COA's decision affirmed.*

Reported by Ashok Kumar